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KETUA PENGARAH HASIL DALAM NEGERI

v.

PROMET (LANGKAWI) RESORTS SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[CIVIL APPEAL NO: R1-14-09-2009]
26 APRIL 2010

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REVENUE LAW: *Income tax - Profits from sale of land - Whether taxable under Income Tax Act 1967 - Seller in business of owning and operating a hotel - Disposal of land not in the course of seller's trading activities - Investment in properties by seller not an "adventure in the nature of trade" for profit-making purposes - Proceeds of sale not subject to income tax*

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The respondent as registered owner sold 11 pieces of lands to Pakatan Permai Sdn Bhd for the purchase price of RM70,349,400. Pursuant to this sale, the appellant raised an assessment under the Income Tax Act 1967 ('the Act') against the respondent on the sale of the lands for RM27,234,648. The respondent appealed against the said assessment to the Special Commissioners of Income Tax ('SCIT'). The reason for the sale was that the then Prime Minister requested the respondent to sell the subject lands to enable another luxury hotel to be developed in Langkawi. Such a request had to be complied with. But for the request, the respondent would never have wanted to sell off part of its prime beachfront land. The respondent was clearly not in the business in land. The respondent's only business was and at all material times only that of owning a hotel. The issue submitted to the SCIT for determination was whether the proceeds from the sale of the lands should be charged with income tax under the Act or real property gains tax under the Real Property Gains Tax Act 1976 ('the RPGT'). The SCIT concluded that the gains on the sale of the 70 acres of the land was a capital realization and not subject to income tax under the Act. The SCIT unanimously allowed the appeal and ordered that the Notice of Assessment be discharged. Dissatisfied, the appellant appealed against the decision of the SCIT.

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Held (dismissing the appeal with costs):

(1) Except for the sale of the 70 acres, there was no evidence of any other transaction of other parts of the lands. There was uncontroverted evidence that the respondent had been and was still in the business of owning and operating the Tanjung Rhu Resort Hotel. The sale was upon a 'request' by the then Prime Minister. Therefore it was not a sale initiated in any way by the respondent. On the evidence there was no intention by the respondent to sell. (paras 33 & 34)

(2) The SCIT had found that: (a) the investment in properties were made as a long term investment; (b) the appellant was not at any time trader in properties nor were the properties acquired as part of the appellant's trade; (c) the investments were not undertaken as an "adventure in the nature of trade" for profit-making purposes. The SCIT had not erred in law or in fact in concluding that the sale of the subject land was a capital realization and therefore not subject to the ITA. (paras 35 & 36)

Case(s) referred to:

ALF Properties Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri [2005] 3 CLJ 936 CA ***(refd)***

Chua Lip Kong v. Director-General of Inland Revenue [1981] 1 LNS 157 PC ***(refd)***

Director General of Inland Revenue v. Mamor Sdn Bhd [1982] CLJ 532; [1982] CLJ (Rep) 89 FC ***(refd)***

E v. Comptroller of Inland Revenue [1970] 2 MLJ 117 ***(refd)***

Edwards (Inspector of Taxes) v. Bairstow and Harrison [1956] AC 14 ***(refd)***

Fen Farming Co Ltd v. Dunsford Inspector of Taxes [1973] STC 474 ***(refd)***

I Investment Ltd v. Comtroller-General of Inland Revenue [1975] 1 LNS 61 FC ***(refd)***

International Investment Ltd v. Comptroller-General of Inland Revenue Malaysia [1978] 1 LNS 69 PC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Hock Lee Holdings Sdn Bhd [2008] 3 CLJ 519 HC ***(refd)***

Leeming v. Jones [1930] AC 415 ***(refd)***

Leftenan-Kolonel Harbajan Singh Jagat Singh & Ors v. Azmi Abdul Rahman [2001] 1 CLJ 198 CA ***(refd)***

Makok Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [1997] 1 LNS 110 HC ***(refd)***

Marson v. Morton [1986] STC 463 ***(refd)***

A *MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2004] 8 CLJ 459 HC* ***(refd)***
NYF Realty Sdn Bhd v. DGIR [1974] 1 MLJ 182 ***(refd)***
Perak Construction Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2001] 8 CLJ 498 HC ***(refd)***
B *Rutledge v. Commissioners of Inland Revenue [1929] 14 TC 490* ***(refd)***
Simmons v. IRC [1980] STC 350 ***(refd)***
The Commissioners of Inland Revenue v. Livingston & Ors [1927] 11 TC 538 ***(refd)***
UHG v. Director-General Of Inland Revenue [1973] 1 LNS 172 HC ***(refd)***

C *For the appellant - Neng Juliana Ismail, Revenue Counsel*
For the respondent - Lim Kian Leong; M/s Lim Kian Leong & Co

Reported by Amutha Suppayah

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JUDGMENT

Aziah Ali J:

[1] By a sale and purchase agreement dated 21 March 1997 the
E respondent as registered owner sold 11 pieces of lands to Pakatan Permai Sdn Bhd for the purchase price of RM70,349,400. The appellant raised the following assessment under the Income Tax Act 1967 ("the Act") against the respondent on the sale of the lands:

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Year of Assessment	Type Of Assessment	Date of Assessment	Amount (RM)
1998	Original	27.12.2004	27,234,648

The respondent then appeals against the said assessment to the
G Special Commissioners of Income Tax ("SCIT").

[2] The issue submitted to the SCIT for determination is whether the proceeds from the sale of the lands by the respondent should be charged with income tax under the Act or
H real property gains tax under the Real Property Gains Tax Act 1976 ("the RPGT"). The SCIT concluded that the gains on the sale of the 70 acres of the land is a capital realization and not subject to income tax under the Act. The SCIT unanimously allowed the respondent's appeal and ordered that the notice of
I assessment for the relevant year be discharged. By a deciding order dated 29 May 2009 the SCIT decided as follows:

ADALAH DIPUTUSKAN bahawa hasil jualan tanah oleh Perayu kepada Pakatan Permai Sdn Bhd melalui Pejanjian Jual Beli bertarikh 21.3.1997 tidak tertakluk di bawah Akta Cukai Pendapatan 1967 tetapi tertakluk di bawah Akta Cukai Keuntungan Harta Tanah 1976.

Dissatisfied with the decision of the SCIT the appellant appeals against the said decision. I dismissed the appeal with costs of RM2,500 to the respondent.

[3] Before the SCIT the following facts were admitted or proved (para. 6 of case stated):

(i) The appellant was incorporated on 20 September 1983 and commenced business on 2 January 1985;

(ii) The appellant was originally a wholly-owned (100%) company of Promet Berhad, and with effect from 27 November 1990 Perbadanan Kemajuan Negeri Kedah ("PKNK") acquired 20% ownership following the transfer of shares from Promet Berhad to PKNK;

(iii) On 13 September 1993, Promet Berhad's shares were sold to Idris Hydraulic (M) Bhd. and subsequently on 22 April 1994 they were sold by Idris Hydraulic (M) Bhd to Kauthar Venture Capital Sdn Bhd ("KVC");

(iv) The appellant is now 80% owned by KVC and 20% by PKNK;

(v) The appellant was the owner of the following pieces of land located in Tanjong Rhu, Langkawi, Kedah:

	Lot No.	Title No.	Mukim	District/ State	Size (acre)
1	–	H.S(D) 12/1983	Air Hangat	Langkawi, Kedah	42.85
2	–	H.S.(D) 1/1984	"	"	1,000
3	1476	P.N 167	"	"	3.14
4	468	Mk. Grant 14	"	"	3.22

5	469	Mk. Grant 82	"	"	1.11
6	470	Mk. Grant 15	"	"	3.66
7	471	S.K 1200	"	"	6.75
8	472	Mk. Grant 83	"	"	8.59
9	473	Mk. Grant 84	"	"	3.46
10	474	Mk. Grant 85	"	"	7.08
11	475	Surat Akuan 28	"	"	1.38
12	477	Mk. Grant 165	"	"	7.66
13	730	SPK 6805	"	"	11.74
14	390	Mk. Grant 218	"	"	0.13
15	817	SPK 4967	"	"	1.87
16	818	SPK 5006	"	"	2.72
17	875	SPK 6886	"	"	2.89
18	1261	Mk. Grant 57	"	"	5.03
19	1262	Mk Grant 58	"	"	3.11
20	1263	Mk Grant 59	"	"	4.16
21	1377	Mk Grant 127	"	"	1.65
22	1380	Mk Grant 128	"	"	0.39

23	1381	Mk Grant 129	"	"	6.06
24	1386	Mk Grant 136	"	"	1.06
25	1428	Q.T(M) 35	"	"	0.39
26	1387	Mk Grant 111	"	"	0.29
27	1389	Mk Grant 162	"	"	0.06
28	1418	Mk Grant 133	"	"	0.05
29	1419	Mk Grant 137	"	"	0.13
30	1420	Mk Grant 163	"	"	2.65
				Total	1,133.28

(vi) Subsequently by a Sale and Purchase Agreement dated 21 March 1997 the appellant sold off the following pieces of land ("the subject lands") to Pakatan Permai Sdn. Bhd. ("PPSB") for a purchase price of RM70,349,400:

	Lot No.	**Title No.**	**Mukim**	**District/ State**	**Size (acre)**
1	–	H.S.(D) 1/1984	Air Hangat	Langkawi, Kedah	41.73/ 1000
2	817	S.P.K 4967	"	"	1.87
3	818	S.P.K 5006	"	"	2.72
4	875	S.P.K 6886	"	"	2.89
5	1261	Mk. Grant 57	"	"	5.03

6	1262	Mk. Grant 58	"	"	3.11
7	1263	Mk. Grant 59	"	"	4.16
8	1377	Mk. Grant 127	"	"	1.65
9	1380	Mk. Grant 128	"	"	0.39
10	1381	Mk. Grant 129	"	"	6.06
11	1428	Q.T.(M) 35	"	"	0.39
				Total	**70**

Since December 1983, no part of the land has been sold by the appellant except the subject lands. The sale of the subject lands was a 'one off transaction'. The reason for the sale was that the then Prime Minister requested the appellant to sell the subject lands to enable another luxury hotel to be developed in Langkawi. Such a request had to be complied with. But for the request, the appellant would never have wanted to sell off part of its prime beachfront land. The appellant is clearly not in the business in land. The appellant's only business is and at all material times only that of owning the hotel;

(vii) The proceeds from the sale of the subject lands by the appellant to PPSB were assessed under the Act by the respondent and the following assessment was raised against the appellant:

Year of Assessment	Type Of Assessment	Date of Assessment	Amount (RM)
1998	Original	27.12.2004	27,234,648

(viii) The appellant being aggrieved by the assessment, filed an objection to the respondent by a letter dated 11 January 2005 and the grounds for the objection by a letter dated 24 October 2005;

(ix) On 13 December 2006, the appellant filed a Form Q dated 12 December 2006 for the Year of Assessment 1998 to the respondent and the Form Q was received by the Special Commissioners of Income Tax on 29 November 2007.

Appellant's Contention

[4] The appellant contends that the sale of the lands by the respondent to Pakatan Permai Sdn. Bhd. is a disposal of a trading stock and constitutes an adventure or concern in the nature of trade, and the proceeds a business income chargeable under subsection 4(a) of the Act.

Respondent's Contention

[5] The respondent contends that it is clearly not in the business of trading in land, the land is not "stock-in-trade", the sale was not an "adventure or concern in the nature of a trade" and that a sale of land by the respondent should not be treated as revenue in nature.

Findings Of The SCIT

[6] The SCIT found the following:

(a) the appellant's sole activity on the owned land has been related to the operation of a luxury hotel resort named 'Tanjung Rhu Resorts';

(b) the running of the resort has been contracted to special hotel managers;

(c) the appellant is a passive investment holding company with no employees and its accounting and administrative requirements are entirely outsourced;

(d) the appellant only sold 70 acres out of 1133.28 acres of their land;

(e) the reason for the sale was on the 'request' of the then Prime Minister;

(f) the appellant did not have any organisation or skills other "commercial" characteristic such as housing developer licence which would suggest that the appellant intended to trade in properties as enunciated in the classic case of *Leeming v. Jones* 15 TC 333;

A (g) a small part of the said lands has been classified under "stock" by the original shareholders and this treatment was not changed for some years but this cannot be held against the Appellant as the vast bulk of the said lands and all the sold lands had been classified under long term asset;

B (h) the classification as land "held for development" was not under "current assets" but was grouped under fixed assets and should therefore be regarded as "long term" investment, with the word "development" being interpreted as a reference to C the desire to develop the hotel resort buildings and facilities.

[7] The SCIT states that the critical issue is whether the investment properties was an "adventure in the nature of trade" undertaken for profit-making purposes. Based on the evidence available and an analysis of the badges of trade, the SCIT found D that the properties cannot be said to be an "adventure in the nature of trade". The SCIT cited the case of *Turner v. Last* as follows:

> The fact that the taxpayer did resell Green Field very soon is E obviously not conclusive (of the fact that the transaction was an adventure in the nature of trade). A man may buy something whether it be land or a chattel, for his own use and enjoyment with no idea of a quick resale, and then, quite unexpectedly, he may receive an offer to buy which is too tempting to refuse …

F **[8]** The SCIT concluded that:

(a) the appellant's investment in properties were made as a long term investment;

G (b) the appellant was not at any time trader in properties nor were the properties acquired as part of the appellant's trade;

(c) the appellant's investment was not undertaken as an 'adventure in the nature of trade', for profit selling motive.

H Therefore the SCIT concluded that the sale of the 70 acres of its land is capital realization and not subject to income tax under the Act. The SCIT unanimously allowed the appeal and ordered that the notice of assessment be discharged accordingly.

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Appellant's Submissions

[9] For the appellant it is submitted that the SCIT has erred in law and in fact on the following grounds:

(a) the adventure or concern in the nature of trade under subsection 4(a) of ITA needs to acquire only some of the characteristics of a trade;

(b) the SCIT failed to render its decision on the best determining factors as laid down in cases such as *Leeming v. Jones* [1930] AC 415; *E v. Comptroller of Inland Revenue* [1970] 2 MLJ 117 and *NYF Realty Sdn Bhd v. DGIR* [1974] 1 MLJ 182, ie,:

(i) intention;

(ii) method of finance;

(iii) alterations to the property;

(iv) treatment in the accounts;

(v) location;

(vi) period of retention;

(vii) subject matter of transaction;

(viii) frequency of transaction; and

(ix) circumstances of realization.

[10] It is submitted that the respondent has not led any evidence to show that it has all the characteristics of an investment holding company. The Directors' Report and Audited Accounts for YE 1986-1992 show that the respondent's principal activity is developing its lands at Tanjung Rhu, Pulau Langkawi into a holiday resort and this principal activity remains unchanged even though the respondent was taken over by KVC and PKNK in 1994 and the management of Tanjung Rhu Resorts is undertaken by a subsidiary company of KVC, Reka Intisari Sdn Bhd.

[11] The appellant refers to the case of *NYF Realty Sdn Bhd v. Comptroller of Inland Revenue (supra)* wherein Sharma J said *inter alia*:

A ... While the Act does not specifically exempt capital gains or otherwise exclude such gains from income, the courts have held that the mere realization of capital appreciation is not income under the ordinary concepts and usages of mankind. However, the Act (ie, the Income Tax Act) does require that taxable income shall include:

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(1) profit from the sale by the taxpayer of any property acquired by him for the purpose of profit making by sale; or

(2) profit arising from the carrying on or carrying out of any profit making undertaking or scheme.

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[12] It is submitted that on the question of what was the intention of the respondent when the respondent purchased the subject properties, the SCIT has not found or admitted any fact on this issue and has failed to consider the principles in *MR* D *Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2004] 8 CLJ 459 that the burden is on the respondent to establish that the subject lands were acquired with the intention of using them as capital asset.

E **[13]** The appellants submits that "The question whether a particular adventure is 'in the nature of trade' or not must depend on its character and circumstances" (*Rutledge v. Commissioners of Inland Revenue* [1929] 14 TC 490). The appellant further refers to the case of *The Commissioners of Inland Revenue v. Livingston & Ors* F [1927] 11 TC 538 wherein it is said the test to determine whether a venture is or is not in the 'nature of trade' is "whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristics of ordinary trading in the line of business in which the venture was made. If G they are, I do not see why the venture should not be regarded as 'in the nature of trade', merely because it was a single venture ..."

[14] The appellant refers to the Respondent's Memorandum of H Articles of Association ("MAA") and submits that regardless of case authorities which pronounced that the MAA of a company is not determinative of a company's intention, the MAA is still *prima facie* evidence of the object and intention with which the respondent purchased the subject land (*MR Properties Sdn Bhd v.* I *Ketua Pengarah Hasil Dalam Negeri, supra; Simmons v. IRC* [1980]

STC 350; *I. Investment Ltd v. Comptroller-General Of Inland Revenue* [1975] 1 LNS 61; *International Investment Ltd v. Comptroller-General of Inland Revenue Malaysia* [1978] 1 LNS 69). Hence the appellant submits that by subclause 3(2) *prima facie* the business of the respondent is established as follows:

> (2) To purchase, take on lease or in exchange, or otherwise acquire lands, houses, offices, buildings and premises and any rights connected therewith and to develop and turn to account any land acquired by the Company or in which it is interested, and in particular, by laying out and preparing the same for building purposes, constructing, altering, pulling down, decorating, maintaining, furnishing, fitting up, and improving buildings, letting on lease, or building agreement and by advancing money to and entering into contracts and arrangements of all kinds with builders, tenants, purchasers and others …

[15] It is submitted that as found by the SCIT, although the original shareholders attempted to develop a condominium and even sold some units, sales were aborted and the condominium project was abandoned at a very early stage. These sales indicate that the respondent has embarked upon the first transaction of a trading nature and has begun to trade which is in line with subclause 3(2) of its MAA and sheds light on the true intention of the respondent.

[16] The appellant further submits that the SCIT has failed to consider the 'badge of trade' and no evidence was led to show that the respondent has the means and long term capacity to invest in the subject land. Further the appellant submits that the SCIT fails to consider that alterations made to the subject property are significant to indicate the transaction has the flavour of trading. Further it is submitted that the subject lands were under the category of 'agriculture' at the time of its alienation but the respondent had applied to change the land use to 'tourism'. A substantial portion of the subject lands were still under the land use category of 'agriculture' and conversion of land use to 'tourism' would make the subject lands more saleable as the lands has the potentials of a tourist attraction. The sale to PPSB was also conditional upon the completion of amongst others 'conversion approval'. It is further submitted that there is evidence that some works were done on the subject lands which clearly shows that the respondent incurred development costs which amount to making alterations or 'dressing up' the lands to make them more saleable.

A **Respondent's Submissions**

[17] For the respondent it is submitted that the proved facts or primary facts as found by the SCIT cannot be questioned unless challenged by the appellant in the case stated. This court is only limited to determine whether the conclusion of law reached by the SCIT is consistent with the primary facts (*Chua Lip Kong v. Director-General Of Inland Revenue* [1981] 1 LNS 157). The court must assume that there had been evidence tendered before the SCIT for them to state it as part of their reasons (*Ketua Pengarah Hasil Dalam Negeri v. Hock Lee Holdings Sdn Bhd* [2008] 3 CLJ 519).

[18] It is submitted that the SCIT had made a finding of fact as to the intention of the respondent when it acquired the said lands where at p. 13 of the case stated the SCIT found that the respondent "was not at any time trader in properties nor were the properties acquired as part of the appellant's trade". It is submitted that the intention of the respondent when it acquired the lands may have changed and whatever the original intention of the respondent, its business now is that of owning and operating a luxury hotel resort. The appellant is not alleging that the respondent is in the business of trading in land. Further the appellant's letter dated 29 November 1985 categorically stated that 'the nature of the business of the company is resort development, provision of hotel and lodging facilities and all kinds of amenities, requirements and services for tourists and travellers and to operate, manage, work and control holiday resorts and camps, vacation centres and to arrange, organize and manage tours of all kinds.' There is also evidence that the respondent has applied for and received tax incentives to operate such activities (exh. G2). It is submitted that the intention for the acquisition of the lands were for such activities and the lands have been used for such activities ever since, except for the portion sold. It is the evidence of AW1 that the lands were bought "for the purposes of long-term investment and as a capital asset" and that "the land was categorized in the non-current asset column of the Appellant's Balance Sheet as 'Development Properties'".

[19] The respondent submits that before the SCIT the evidence of both AW1 and AW2 as to the respondent's business and its intention in holding the sold lands has been fully corroborated by contemporaneous documents and by the actual historical facts of

the respondent's operations and had been tested under cross-examination and is not contradicted. The respondent's business was and is always owning and operating a hotel resort. There is ample evidence to show that the SCIT justified their finding as follows:

> The Appellant's sole activity on the owned land has been related to the operation of a luxury resort named Tanjung Rhu Resorts. In actual fact the running of the resort has been contracted to special hotel managers. Essentially the Appellant is a passive investment holding company with no employees and its accounting and administrative requirements are entirely outsourced.

Therefore it is submitted that the appellant's contention that there is no evidence to prove that the respondent had all the characteristics of an investment holding company is without merit.

[20] On the issue of classification of the subject lands, the respondent submits that the respondent's audited accounts for years ending 31 December 1986, 31 December 1987, 31 December 1998 and 31 December 2000 show that the subject lands have never been classified under 'Current Assets' or 'stock'. In all these accounts there has always been a separate distinct category for 'Current Assets' including 'stock' but the subject lands have never been classified as 'stock in trade' or even 'current asset' but have consistently been classified as a separate category of assets called 'Properties under Development'.

[21] The respondent submits that the appellant is seeking to take advantage of the fact that the respondent's lands have been classified under 'Properties Under Development' to argue that this means that the lands must therefore be 'stock' or 'current assets'. It is submitted that this is erroneous because there has always been a separate and distinct category for 'Current Assets' with a sub-category for 'stock' in each of the accounts and the sold lands have never been under this category.

[22] Further the respondent submits that the appellant is not contending that the respondent is in the business of trading in land. The appellant accepted that the respondent is in the business of owning and operating a luxury hotel resort. Thus the treatment of the lands in a separate category is entirely consistent with its business. It is submitted that the principle of law is that the accounting treatment of a transaction or the way land is

reflected in the accounts of the taxpayer is not decisive against the taxpayer and the true nature of the holding of the land and the transaction has to be examined from the taxpayer's perspective (*ALF Properties Sdn Bhd v. Ketua Pengarah Jabatan Hasil Dalam Negeri* [2005] 3 CLJ 936).

[23] It is the respondent's submissions that the undisputed facts in this case are:

(a) there is no evidence that the lands were dressed up for sale in 1997 or even prior to that;

(b) only 28.27 out of the 70 acres sold was 'agricultural' and in any event, prime beach front land did not require to be 'dressed up' to look attractive;

(c) the undisputed evidence of AW2 that the respondent never sought a buyer;

(d) it was a request by the then Prime Minister to sell the land to a competitor hence the respondent need not spend money to "dress up" the sold lands;

(e) the requirement for conversion was a condition of the sale so obviously the land had not been "dressed up" before the sale;

(f) the conditions in the SPA is a fairly standard terms;

(g) the evidence of AW2 was that some small parcels remained 'agriculture' because they were acquired after the main parcels;

(h) the intention of the respondent and the State Authorities in alienating the lands was for the purpose of tourism and conversion is therefore a formality;

(i) only 41.73 acres out of 1,000 acres of Lot 1/1984 and 28.27 acres out of 32.72 acres of the West Beach were sold and the sums spent on these lands were spent in 1996 or earlier and not in anticipation of a sale. The sums spent were miniscule compared with the size of the area and were costs incurred as part of the development of the respondent's beach resort and were not to 'dress up' the lands. The sums were reflected as part of Development Costs of long term leasehold lands and not as 1997 expenditure;

(j) there is absolutely no evidence that the lands were 'dressed up' or 'altered' for sale.

[24] The respondent submits that before the SCIT the appellant has not raised the contention that the sold lands were 'dressed up' or 'altered' for sale and the appellant is precluded from raising this contention before this court (*Leftenan-Kolonel Harbajan Singh Jagat Singh & Ors v. Azmi Abdul Rahman* [2001] 1 CLJ 198).

[25] It is submitted that the original buyers of the lands may have the intention to develop the property for sale but abandoned the idea. Whatever units sold has long been repurchased and this itself clearly indicates that it is the respondent's intention to keep all its property for the luxury hotel business. The structures are now part of the Tanjung Rhu Hotel resort and are being operated as a part of the hotel. The original shareholders had at first itemized parts of the lands and buildings as 'stock' in the accounts but the lands were not sold but were held for long term investment. The lands were subsequently re-classified under fixed assets as 'Properties Under Development' which indicates that these lands were for long term investment.

[26] The lands were sold on 'request'. AW2 was at the material time a director of the respondent. AW2 confirmed under re-examination that it was not possible to refuse the Prime Minister's 'request'. Otherwise the respondent would not have sold them. It is submitted that but for the request, there was no logical reason for the respondent to sell off part of its prime beach front land to a competitor. The existence of the Four Seasons Hotel Resort developed by MAS which now operates in competition with the respondent is corroboration of the testimony of AW2.

[27] It is submitted that challenging the oral testimony of the respondent's witness is in fact challenging the credibility of such oral testimony, which is not within the province of this court as the decision lies solely with the SCIT (*Makok Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1997] 1 LNS 110; *Fen Farming Co. Ltd v. Dunsford Inspector of Taxes* [1973] STC 474). It is further submitted that there were other considerations taken into account by the SCIT in reaching their conclusion that the sale of the subject lands was a capital realisation.

[28] The respondent has owned the lands since 1983/1984 and in 1994 had undergone a change of shareholder whose intention was clearly to hold the lands for long term investment. The respondent has consistently treated the disposal of the sold lands as disposal of a long term investment which is capital in nature and not as a revenue transaction. The evidence of AW1 as to the treatment of the lands and sold lands under the accounts has not been challenged by the appellant and therefore deemed accepted. The respondent's financial statements and income tax submission for the Year of Assessment 1998 (exh. G1) were prepared on the basis that the sale was that of a fixed asset which should be treated under the RPGT Act and the respondent has made provision for real property gains tax of RM3,360,000. Therefore it is submitted that the sale of the 70 acres of land was a capital transaction and there is ample evidence to show that it was not 'an adventure in the nature of trade' as alleged by the appellant.

Decision

[29] Section 4(a) of ITA provides as follows:

> Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:
>
> Gains or profits from a business, for whatever period of time carried on; …

So what is the 'business' of the respondent? The SCIT found from the facts admitted and proved that the respondent is clearly not in the business in land. The respondent's only business is and at all material times only that of owning the hotel. The SCIT found that the appellant's sole activity on the owned land has been related to the operation of a luxury hotel resort named 'Tanjung Rhu Resorts'. The SCIT found that the appellant is a passive investment holding company with no employee and its accounting and administrative requirements are entirely outsourced.

[30] The SCIT then considered the question of what was the intention of the respondent when it acquired the lands. In considering this issue, the SCIT acknowledged what the Court of Appeal said in *ALF Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (supra)* as follows:

> It is not safe for the Special Commissioners to come to the conclusion that the Appellant's principal activity is dealing in property merely on the ground that it is one of the stated objects of the Appellant as found in its Memorandum of Association. To come to a safe conclusion one has to go into the activities of the Appellant whether in the past or in the present to find out whether the activities are one of the stated objects of the Appellant.

In the case of *Perak Construction Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2001] 8 CLJ 498 cited by the respondent the court said as follows:

> ... Whether or not the lots disposed of by the taxpayer to the developer were stock in trade depends on whether it can be established that the taxpayer was, at the material time, trading or had been engaged in an adventure in the nature of a trade.

[31] I find that, in arriving at the conclusion that the sale by the respondent of 70 acres of its land is capital realization and not subject to income tax under the Act, the SCIT had considered the oral testimonies of the respondent's witnesses, the accounts produced and the nature and history of the ownership and holding of the lands. The SCIT accepted the respondent's evidence that this was a sale that it could not refuse.

[32] I agree with the respondent that the issue of credibility of oral testimonies is an issue for the SCIT to decide. In the case of *Director General of Inland Revenue v. Mamor Sdn Bhd* [1982] CLJ 532; [1982] CLJ (Rep) 89 cited by the respondent, the Federal Court said:

> Where there is ample evidence for the Special Commissioners to consider the Court must treat the decision of the Special Commissioners as final. It matters not that on the same evidence the Court might not, if it were in its province to decide, have come to the same conclusion. The findings of primary facts by the Special Commissioners are unassailable. *Chu Lip Kong v. Director-general Of Inland Revenue* [1982] CLJ (Rep) 1 (Privy Council Appeal No. 21 of 1979) A Court of appeal is not concerned with the evidence given in a case stated by the Special Commissioners but with the facts therein stated and it is points of law upon those facts the Court has to decide. (*Uhg v. Director-General Of Inland Revenue* [1973] 1 LNS 172; *Edwards (Inspector of Taxes) v. Bairstow and Harrison* [1956] AC 14).

[33] Except for the sale of the 70 acres, there is no evidence of any other transaction of other parts of the lands. There is uncontroverted evidence that the respondent has been and is still in the business of owning and operating the Tanjung Rhu Resort Hotel. The SCIT accepted the respondent's contention that the sale was upon a 'request' by the then Prime Minister. Therefore it was not a sale initiated in any way by the respondent. On the evidence there was no intention by the respondent to sell.

[34] In *UHG v. Director-General Of Inland Revenue* [1973] 1 LNS 172, the Federal Court cited with approval the passage in the English authority of *Edwards (Inspector of Taxes) v. Bairstow and Harrison* [1956] AC 14:

> It is well established that where the appeal is by way of a case stated a statutory duty is laid upon the Special Commissioners to set forth the facts as found by them and the deciding order but not the evidence on which the findings are based. The court of appeal is not concerned with the evidence given in the case stated but with the facts therein stated and it is points of law upon those facts the Court has to decide. The question for the Court of appeal therefore is whether, given the facts as stated, the Special Commissioners were justified in law in reaching the conclusions they did reach.

[35] Based on the evidence available before it and upon analysis of the badges of trade (with reference to *Leeming v. Jones, supra*; *NYF Realty Sdn Bhd v. CIR* [1974] 1 MLJ 182 and *Marson v. Morton* [1986] STC 463, the SCIT found that:

(a) the investment in properties were made as a long term investment;

(b) the appellant was not at any time trader in properties nor were the properties acquired as part of the appellant's trade;

(c) the investments were not undertaken as an "adventure in the nature of trade" for profit-making purposes.

Contrary to the submissions by the appellant, I find that the SCIT did consider the authority of *Leeming v. Jones* in its determination whether or not the investments were 'an adventure in the nature of trade'.

[36] Having considered the findings of primary facts and the analysis of the evidence and oral testimonies and the reasons put forth by the SCIT, I am unable to agree with the appellant that the SCIT has erred in law or in fact in concluding that the sale of the subject land is a capital realization and therefore not subject to the ITA. The appeal is consequently dismissed with costs of RM2,500 to the respondent.